Superior Court of the State of Washington
For Thurston County

Paula Casey, *Judge*
Department No. 1
Thomas McPhee, *Judge*
Department No. 2
Christine A. Pomeroy, *Judge*
Department No. 3
Gary R. Tabor, *Judge*
Department No. 4

Chris Wickham, *Judge*
Department No. 5
Anne Hirsch, *Judge*
Department No. 6
Carol Murphy, *Judge*
Department No. 7
Lisa L. Sutton, *Judge*
Department No. 8

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November 9, 2012

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LETTER OPINION

Re: *Washington Education Assn et al v State Retirement Systems et al*
Thurston County Superior Court No.11-2-02213-4

Dear Counsel:

On September 7, 2012, this Court heard Plaintiff's Motion for Summary Judgment on its claim that the repeal of the UCOLA by SHB 2021 violates Article I, Section 23 of the Constitution of the State of Washington. The Court also heard Defendants' Motion to Dismiss Certain Class Allegations. The decision on both motions follows.

Plaintiffs' Motion for Summary Judgment on Contract Impairment Claim

Before 1995, members of PERS 1 and TRS 1 were entitled to several different cost-of-living adjustment benefits (COLAs) to their pension benefits. These various benefits are described in Declaration of Harriet Strasberg. In 1995, the Legislature adopted SSB 5119 in an effort to simplify the benefit calculation and administration. The bill repealed the existing benefits and replaced them with a common, uniform COLA, known generally as the "UCOLA." The legislation contained the following provision:

> The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that time.

RCW 41.40.197(5) and RCW 41.32.489(6). In 2011, the Legislature amended these statutes again and repealed the UCOLA for all active and retired members. It did not offer a benefit in exchange for terminating the UCOLA.

Plaintiffs moved for summary judgment on the ground that the UCOLA is a vested contractual benefit and the State cannot repeal that benefit without offering an offsetting benefit. The plaintiffs argue that the 2011 action – the

repeal itself – has no offsetting benefit, and therefore the action was unlawful.

The leading case is *Bakenhus v. Seattle*, 48 Wn.2d 696 (1956). In that case, our Supreme Court held that a cap on pension benefits adopted after employment started impaired the employment contract and was void.

The State argues that the *Bakenhus* doctrine does not apply because *Bakenhus* was premised on a state constitutional prohibition on government gratuities that was amended in 1958. *See* Washington Constitution, Art. 2 § 25 (amended in 1958). However, the *Bakenhus* doctrine is clearly effective law that our Supreme Court has applied well after the constitutional amendment to which the State refers. *See, e.g., McAllister v. City of Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623 (2009).

Two cases are dispositive to this Court, *Jacoby* and *Navlet.*[1] In each of those cases, our Supreme Court rejected employers' attempts to reserve the right to unilaterally withdraw vested retirement benefits.

In *Jacoby*, the Court held that an employer could not unilaterally defund a pension for existing employees, regardless of its attempt to reserve that right at the onset of employment. The Court held, "[c]learly ... an employer cannot offer a retirement system as an inducement to employment and ... withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder." 77 Wash.2d at 916.

In *Navlet*, the Court also held that an employer could not reserve the right to unilaterally terminate vested retirement benefits. In that case, the Court expanded the doctrine by applying it to peripheral retirement benefits – specifically, health insurance and welfare benefits. The Court held that "this court's treatment of pension benefits . . . appl[ies] to all employee benefits."[2]

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[1] *Jacoby v. Grays Harbor Chair & Manufacturing Co.*, 77 Wn.2d 911 (1970); *Navlet v. Port of Seattle*, 164 Wn.2d 818 (2008).

[2] 164 Wn.2d at 838 (quoting *Vizcaino v. Microsoft Corp*, in which 120 F.3d 1006, 1014 (9th Cir. 1997) (applying this Washington State law to employee stock purchase plan)).

This Court must follow the binding precedent of *Jacoby* and *Navlet*. Under that precedent, the State is prohibited from reserving the right to unilaterally terminate the UCOLA. The UCOLA was vested because employees began work based, partially, on the promise of a UCOLA.[3] Further, the parties agree that the State did not offer any off-setting benefit when it terminated the UCOLA. The State's actions therefore violated existing law and summary judgment to the employees is warranted as a matter of law.

This Court is aware that our Supreme Court may ultimately abandon a black letter approach to the prohibition on reservations of rights. The high court may distinguish COLAs from the core retirement rights at issue in *Jacoby* and *Navlet*. COLAs are generally implemented to create flexibility during economic shifts, and this state has weathered a major economic shift that required such flexibility. This Court also notes that *Navlet* was a five-four decision and, although decided only four years ago, there has been a major change in the Supreme Court bench. This Court's duty, however, is to follow binding precedent and *Jacoby* and *Navlet* require summary judgment in the employees' favor.

Defendants' Motion to Dismiss Certain Class Allegations

On June 4, 2012, this Court entered an Order Granting Plaintiffs' Motion for Class Certification. That order defined the class as follows:

> All individuals who are active, retired, or terminated members of PERS 1 and TRS 1 who, as of July 1, 2011: (a) have not yet reached age 66 or who have not yet retired or (b) are retired and are receiving the Uniform COLA or (c) would have been eligible to receive Uniform COLA payments in 2011 but who have not received Uniform COLA payments and/or will not receive such payments in the future under the terms of SHB 2021; but excluding individuals receiving the basic or alternative minimum benefit.

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[3] *See Washington Federation of State Employees v. State*, 98 Wn.2d 677, 683 (1983); *see also Wilder v. Wilder*, 85 Wn.2d 364, 367 (1975) (holding that pension rights vest regardless of whether it is certain that the benefits will be paid).

Defendant has moved to dismiss certain Plan 1 members from the class and from this action: (1) Plan 1 members who performed no service between 1995 and 2011 and (2) Plan 1 retirees whose retirement allowance has already been set by the statutory provisions for a minimum monthly allowance (which are unaffected by the repeal.)

As to group (1), the Court is prepared to dismiss those class members. If the Supreme Court ultimately rules that the UCOLA was legally repealed, those class members may have a claim to reinstatement of the various benefits in place at the time of passage of SSB 5119. They have no standing, however, to repeal the passage of an act that did not take effect until after their employment was completed. Similarly, group (2) shall also be dismissed on the grounds that the repeal did not affect their benefits.

Defendant has also moved to dismiss the estoppel claims on the grounds that this claim is too individualized to be covered by a class action. This issue is apparently moot, but this Court will issue a ruling because of the uncertainty of appellate rulings in this case. Because this motion is made under Civil Rule 12(b)(6), the Court must consider Plaintiffs' allegations as true. There are sufficient allegations of common treatment to deny a motion to dismiss, without prejudice.

The Court will enter an order consistent with this ruling ex parte with all parties' counsel's signatures or on notice to all parties on a Friday civil motion calendar.

Sincerely,

Chris Wickham
Judge

c Clerk, for filing